14-471

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Affirmed
Strong &
Writ

Judge Davis—

9 Wall 415

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~444~~ 228

NEW BEDFORD AND NEW YORK STEAM PROPELLER CO.

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 23, 1870.

Dec 1871 97-5

7 Wallace

2 St 696,

13 St at Large

SUPREME COURT OF THE UNITED STATES.

No. 444.

NEW BEDFORD AND NEW YORK STEAM PROPELLER CO.

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	5	4
Special plea	6	4
Final judgment by the court	7	5
Application for an appeal	8	5
Order of court allowing same	8	5
Findings of fact and of law	9	5
Certificate	15	7

1 United States Court of Claims. December term, 1868.

NEW BEDFORD AND NEW YORK STEAM PROPELLER COMPANY
vs.
THE UNITED STATES. } 5557.

To the hon. the judges of the Court of Claims:

Your petitioner, The New Bedford and New York Steam Propeller Company, organized under the laws of the State of Massachusetts, and doing business in the city of New Bedford, Mass., and city of New York, N. Y., respectfully represents, that said corporation was, on the 5th day of April, A. D. 1864, the owner of the steamer called the "Thorn;" that on said day the said vessel entered upon the service of the United States, under and by virtue of a regularly executed charter-party, signed by J. C. Gibbs, agent on the part of said corporation, and by Capt. F. J. Crilly, acting quartermaster United States Army, on behalf of the United States, a copy of which said charter-party is hereto attached and made part hereof, marked "A." Your petitioner further represents that, by the terms of said charter-party, the United States agreed to pay said corporation for each and every day said vessel might be employed in said service, the sum of one hundred and fifty dollars, which it alleges was but a reasonable compensation for the services of said vessel; that said vessel continued in said service, faithfully performing all the requirements of said charty-party, until the day of March, 1865, when said vessel was destroyed by the explosion of a rebel torpedo, in the Cape Fear River, North Carolina, and became a total loss to said corporation; and your petitioner, further avers that, by the terms of said charter-party, the United States assumed the war risk; that the destruction and loss of said vessel occurred by reason of the dangers incident to the then-existing war, and through no fault
2 or neglect of your petitioner, and from causes intended to be and actually were embraced within the indemnifying clauses of said charter-party, wherein the United States assumed the war risk to which said vessel might be subjected; your petitioner further states that the actual, as well as the appraised, value of such vessel was forty thousand dollars, at the time of said loss; and that it has received from the United States, in consideration of the total loss of said vessel, the sum of twenty-eight thousand six hundred and two dollars and thirty-six cents, and no more, and that there is due and owing said corporation on account of said loss, the sum of eleven thousand three hundred and ninety-seven dollars and sixty-four cents, and for this amount it asks judgment.

Your petitioner further avers that it has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against said Government; that it has made application to the proper Department for payment of the claim herein stated, but without success.

Your petitioner, therefore, by reason of the premises, asks judgment for the whole amount herein claimed, to wit, eleven thousand three hundred and ninety-seven dollars and sixty-four cents, ($11,397 64.)

CHIPMAN, HOSMER & CO,
Solicitors for Petitioners.

STATE OF NEW YORK,
City and County of New York, ss:

Personally came before me, a notary public in and for said county and State, John C. Gibbs, who, being duly sworn, says that he is agent of the petitioner in the foregoing petition; that no assignment of the claim therein stated has been made except as in said petition stated; that the amount claimed is due to the petitioner, after allowing all just offsets and credits; and that the matters and things in said petition stated are true.

JOHN C. GIBBS,
Agent for the New Bedford and New York Steam Propellor Company.

Subscribed and sworn to before me this 13th day of February, A. D. 1869.

[SEAL.] SAMUEL GODWIN,
Notary Public, N. Y. County.

3 "A."

This charter-party of affreightment, made this fifth day of April, in the year one thousand eight hundred and sixty-four, between J. C. Gibbs, agent of the steamer or vessel, called the "Thorn," of New York, of the burthen of 403 registered tons or thereabouts, at present lying in the harbor of New York, and commanded by Capt. W. Morgan, of the first part, and Capt. Francis J. Crilly, assistant quartermaster United States Army, for the United States, of the second part, witnesseth: That the said party of the first part does and doth hereby grant and to freight let, and the said party of the second part does and doth hereby to freight take, the steamer "Thorn," to load at New York, or elsewhere, and proceed on the voyage hereinafter mentioned. (Always reserving sufficient room for the storage of the vessel's cables and materials, and accommodation of the officers and crew, and, if a steam vessel, for necessary supply of coal.) And thereupon the party of the first part, and his executors, administrators, and assigns, doth hereby covenant, grant, and agree, to and with the said party of the second part, that the said vessel now is, and shall be kept and maintained during the whole of the voyage mentioned in this contract, tight, staunch, strong, and well and sufficiently manned, victualled, tackled, apparelled, and ballasted, and furnished in every respect fit for merchants' service, at the cost and charge of her owners. (The time lost in consequence of any deficiency in these respects, not to be paid for by the United States.) And shall, on the 5th day of April, 1864, be ready to receive on board, whenever tendered alongside by the Quartermaster United States Army, his factors or assigns, such troops, men, animals, and supplies, or cargo, as they shall order and direct and the said vessel can conveniently stow and carry; and when laden shall proceed with the first good opportunity, and without delay, from the port of New York, or elsewhere, and proceed direct to such ports and places as ordered by the Quartermaster United States Army, and deliver cargo to the quartermaster, or duly authorized agent of the Quartermaster's Department. All pilotage and port charges will be paid by the United States after leaving the port of New York. All cargo to be received and delivered within reach of said vessel's tackles. The said vessel shall deliver her cargo in good order and condition, (the dangers of the seas, fire, and navigation, and the restraint of princes and rulers being always excepted.) The war risk

to be borne by the United States; the marine risk to be borne by the owners. For a period of thirty days, and as much longer as her services may be required. To be employed in such service as party of the second part may direct.

In consideration whereof, the said party of the second part does agree to employ the said vessel on the voyage or voyages aforesaid; and that, as a freight or hire of the said vessel during the
4 term of this contract, he will pay, or cause to be paid, the full and just sum of one hundred and fifty dollars per day for each and every day said vessel may be employed, and will furnish all fuel necessary for the navigation of the said vessel, if a steamer, until the said vessel is returned to the said party of the first part, in New York, in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea and in port, bursting of boilers, and breakage of machinery excepted: To become due, owing and payable in the manner and form following, that is to say: payable to the order of J. C. Gibbs, at the Quartermaster's office of the United States, at New York, monthly, upon presenting certificates of the duly authorized agent of the Quartermaster's Department that the said vessel has faithfully performed her part of this contract.

The said vessel is valued and appraised at the sum of forty thousand dollars, and should she be retained so long in the service of the United States that the money paid and due on account of said charter, (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of thirty-three per cent. per annum on said appraised value,) shall be equal to said appraised value, then the said vessel shall become the property of the United States without further payment, except such sum as may then be due on account of the services of the said vessel, rendered under the said vessel charter.

And further, if at any time during the continuance of this charter, the United States shall elect to purchase the said vessel, then they shall have the right to take her at the appraised value at the date of charter, and all money then already paid and due on account of said charter, (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of thirty-three per cent. per annum on the original appraised value,) shall apply on account of the said purchase.

This charter shall go into effect at 12 o'clock m. of the 5th day of April, 1864, and shall continue in force as long as said vessel may be required by the United States War Department.

No member of Congress shall be admitted to any share or part of this contract, or any benefit to arise therefrom.

In witness whereof, the said parties to these presents have hereunto interchangeably set their hands, and affixed their seals on the 5th day of April, 1864.

[L. S.] J. C. GIBBS.
[L. S.] F. J. CRILLY,
Captain, A. Q. M.

(Executed in quintuplicate.)

Signed, sealed, and delivered in the presence of us—
W. L. TALMAN.
H. W. STUDLEY.

In the United States Court of Claims. December term, A. D. 1868.

5 NEW BEDFORD & NEW YORK STEAM Propeller Co. *vs.* THE UNITED STATES. } No. 5557.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein, and, not confessing the same or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of $11,397 64 the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegience to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

6 In the Court of Claims of the United States. December term, 1869.

NEW BEDFORD & NEW YORK STEAM PROpeller Co. *vs.* THE UNITED STATES. } No. 5557.

Special plea for defendants.

And the said defendants, by their Attorney General, now come and, by leave of court, (as expressed in Rule IX,) say that the said claimant ought not further to maintain said action, because—

1. While the claim presented in this petition is such as is ordinarily settled in an Executive Department, the petition does not set forth the decision thereon of the proper Department of the Government to which application was (as is alleged) made for the payment of the claim. (Rule II.)

2. The petition does not set forth a full statement of the action, on the claim therein presented, by a Department of the Government, as required by section 1 of the act of February 4, 1855.

3. The evidence in the case does not show that any such application has ever been made to any Department of the Government, whether with or without success, or any action whatever thereon, without which action this court has no lawful jurisdiction in this case.

And the said defendants pray judgment, &c.

THOMAS H. TALBOT,
Assistant Attorney General.

7 In the Court of Claims.

NEW BEDFORD AND NEW YORK STEAM PROPELLER COMPANY
vs.
THE UNITED STATES. } 5557.

And now, to wit, 28th of February, A. D. 1870, the court, upon due consideration of the premises, find in favor of defendants, and do order, adjudge, and decree that the said claimant take nothing by its suit, and that its petition be dismissed.

By the court:
A true copy of record.

8 In the Court of Claims. Dec. term, 1869.

NEW BEDFORD & NEW YORK STEAM PROPELLER COMPANY
vs.
THE UNITED STATES. } 5557.

To the honorable the Court of Claims.

The claimants, by their attorneys, Chipman, Hosmer & Co., make application for the allowance of an appeal to the Supreme Court of the United States from the judgment of this court rendered 28th February, 1870, in favor of the defendants in the above-entitled action, and dismissing the petition of the said claimants.

CHIPMAN, HOSMER & CO.,
Counsel for Claimants.

Filed in clerk's office 14 March, 1870.

Ordered that the appeal as prayed in the case of The New Bedford and New York Steam Propeller Company vs. the United States, 5557, be allowed.

By the court.
March 14, 1870.

9 In the Court of Claims.

THE NEW BEDFORD AND NEW YORK STEAM PROPELLER COMPANY
vs.
THE UNITED STATES. } No. 5557.

In this case the court find the facts to be—

1st. That the claimant is a body corporate, created by the laws of the State of Massachusetts.

2nd. That, on the 20th day of February, 1869, the claimant filed in this court its petition claiming the sum of $11,397 64 as a balance due for the loss of its steamer Thorn, while in the military service of the United States.

3rd. That, on the 5th day of April, 1864, the claimant, by its
10 agent, J. C. Gibbs, chartered its steamer Thorn to the defendants by a contract of charter, part of which is correctly set forth in the said petition, and is made a part of these findings.

4th. That the said steamer remained in the military service of the defendants until the 4th day of March, 1865, when she was sunk in the Cape Fear River by the explosion of a torpedo which had been placed there by the public enemy. The said steamer was so sunk without fault or negligence on the part of the owner, and the owner then and thereupon abandoned the said steamer as a total loss.

5th. That the claimant presented to the Government a claim for $40,000 for the loss of the said steamer. The claim was transmitted by the Quartermaster General to the Third Auditor on the 14th day of February, 1866, by a letter as follows:

11 "QUARTERMASTER GENERAL'S OFFICE,
"*Washington, D. C., February 14th*, 1866.

"SIR: I have the honor to transmit herewith for your information and official action the final account for purchase of steamer 'Thorn,' as follows:

"For purchase of steamer 'Thorn'

"By valuation as per charter		$40,000 00
"By 33 per cent. per annum from 12 m., April 5th, 1864 to 4 p.m., March 4th, 1865—10 27-3' 4-24 months		11,996 11
By "running expenses 11 months at $2,100 per month		23,100 00
		$75,096 11
"To amount received from U. S. for services from 12 m., April 5th, 1864, to March 4th, 1865, 4 p. m., being 333 6-24 days, at $150	$49,975 00	
Less 23 5-24 days lost	3,481 25	
		46,493 75
"Balance due		$26,602 36

"This vessel was sunk March 4th, 1865, 4 p. m., near Fort Anderson, it is supposed, by the explosion of a torpedo.

12 "This office is unofficially informed that additional papers relating to this claim have been filed in the office of the Third Auditor.

"By order of Q. M. Gen'l.

"Very respectfully your obd't servant,

"GEO. D. WISE,
"*Brt. Brig. Gen. & Q. M., in charge 3d Div.*

"Hon. JOHN WILSON,
"*Third Auditor Treasury Department.*"

And on the 15th day of June, 1866, the Third Auditor made the following adjudication:

"TREASURY DEPARTMENT,
"THIRD AUDITOR'S OFFICE, *June* 15th, 1866.

"In pursuance of an act of Congress approved 3rd of March, 1849, entitled an act to provide for the payment of horses and other property lost or destroyed in the military service of the United States," as amended and corrected by the 5th section of the act of March 3rd, 1863, it is adjudged by me that there is due from the United States to the "New Bedford and New York Steam Propeller Company," for the steamer

13 'Thorn,' destroyed by a torpedo on the 4th day of March, 1865, near Fort Anderson, in Cape Fear River, N. C., while in the military service of the United States, the sum of twenty-eight thousand six hundred and two dollars and thirty-six cents ($28,602 36.)

"JOHN WILSON,
"*Third Auditor.*"

6th. That the amount so adjudged due by the Third Auditor, was paid to, and received by, the claimant, and no other or further sum was ever paid on account of the loss of the claimants' said steamer.

7th. That the said steamer, when she entered the service, and at the time of her loss, was of the value of $40,000.

The United States never at any time notified the claimant of their election to purchase said vessel, or to take her under the accruing or purchases clauses of the charter-party.

14 8th. That the claimants have at all times borne true allegiance to the Government of the United States, and that they have not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said Government.

9th. And as a conclusion of law, the court held, as in the recent case of Spear & Lang, that the United States, under such a charter-party, became the equitable owner of the vessel to the extent of the sum earned over and above the expenses and profits stipulated for; and that to the extent of such sum the owners had received so much payment on the price of the vessel; and that whether she was taken by the United States under the option given to purchase at any time, or perished by one of the perils against which the United States engaged to insure, this accruing clause was equally applicable. It was only the balance due on the price of the vessel which the original owner could claim, and not the amount of the valuation; and on this ground the claimants in this case were precluded from any further recovery, and therefore the court dismissed the petition.

By the court.

15 In the Court of Claims.

NEW BEDFORD AND NEW YORK STEAMER Propeller Company *vs.* THE UNITED STATES. } No. 5557.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the counsel for claimants for the allowance of an appeal, as filed in the clerk's office 14 March, 1870, and of the order of the court, 14 March, 1870, allowing the same; of the findings of fact and the conclusions of law on said facts, on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 22d day of December, 1870.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover: No. 444. The New Bedford and New York Steam Propeller Company, appellants, vs. the United States. Court of Claims. Filed 23d December, 1870.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE NEW BEDFORD AND NEW YORK PROPELLER COMPANY
vs.
THE UNITED STATES.

No. 228.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE NEW BEDFORD AND NEW YORK PROPELLER COMPANY
vs.
THE UNITED STATES. } No. 228.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

FACTS.

The appellants chartered the steamer "Thorn" to the Government by a charter party dated the 5th of April, 1864, containing these clauses:

"The war risk to be borne by the United States, the marine risk to be borne by the owner, for a period of thirty days, and as much longer as her services may be required, to be employed in such service as party of the second part may direct."

"The said vessel is valued and appraised at the sum of $40,000, and should she be retained so long in the service of the United States that the money paid and due on account of said charter, (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of thirty-three per cent. per annum on said appraised value,) shall be equal to said appraised value, then the said vessel shall become the property of the United States without further payment, except such sum as may then be

due on account of the services of said vessel, rendered under the said vessel charter."

"And, further, if at any time during the continuance of this charter, the United States shall elect to purchase the said vessel, then they shall have the right to take her at the appraised value at the date of charter, and all money then already paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of thirty-three per cent. per annum on the original appraised value) shall apply on account of the said purchase."

The said steamer remained in the military service of the defendants until the 4th of March, 1865, when she was sunk in the Cape Fear river by the explosion of a torpedo placed there by the enemy. The owners presented to the Government a claim for $40,000 for the loss of said steamer. This claim was transmitted by the Quartermaster General to the Third Auditor on the 14th of February, 1866, by a letter, as follows:

"QUARTERMASTER GENERAL'S OFFICE,
"*Washington, D. C., February* 14, 1866.

"SIR: I have the honor to transmit herewith, for your information and official action, the final account for purchase of steamer 'Thorn,' as follows:

"For purchase of steamer 'Thorn.'

"By valuation as per charter	$40,000 00
"By 33 per cent. per annum from 12 m. April 5, 1864, to 4 p. m., March 4, 1865—10 27—3' 4—24 months.....	11,996 11
"By running expenses, 11 months, at $2,100 per month.....	23,100 00
	75,096 11

"To amount received from U. S. for services from 12 m. April 5, 1864, to March 4, 1866, 4 p. m., being 333 6-24 days, at $150.	$49,975 00	
"Less 23 5-24 days lost.....	3,481 25	
		$46,493 75
"Balance due.....		26,602 36

"This vessel was sunk March 4, 1865, 4 p. m., near Fort Anderson, it is supposed, by the explosion of a torpedo.

"This office is unofficially informed that additional papers relating to this claim have been filed in the office of the Third Auditor.

"By order of the Quartermaster General.

"Very respectfully, your obedient servant,

"GEO. D. WISE,

"*Bvt. Brig. Gen. and Q. M. in charge 3d Div.*

"Hon. JOHN WILSON,

"*Third Auditor Treasury Department.*"

And on the 15th day of June, 1866, the Third Auditor made the following adjudication:

"TREASURY DEPARTMENT,

"*Third Auditor's Office, June 15, 1866.*

"In pursuance of an act of Congress, approved 3d of March, 1849, entitled 'An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States,' as amended and corrected by the 5th section of the act of March 3, 1863, it is adjudged by me that there is due from the United States to the 'New Bedford and New York Steam Propeller Company,' for the steamer 'Thorn,' destroyed by a torpedo on the 4th day of March, 1865, near Fort Anderson, in Cape Fear river,

N. C., while in the military service of the United States, the sum of twenty-eight thousand six hundred and two dollars and thirty-six cents, ($28,602 36.)

"JOHN WILSON, *Third Auditor.*"

The amount, so adjudged due by the Third Auditor, was paid to and received by the claimant, and no other further sum was ever paid on account of the loss of said steamer.

The Court of Claims found that the said steamer when she entered the service, and at the time of her loss, was of the value of $40,000; that the United States never at any time notified the claimant of their election to purchase said vessel, or to take her under the accruing or purchase clauses of the charter-party, above quoted.

As a conclusion of law, upon these facts, the Court of Claims held that "the United States, under such a charter-party, became the equitable owner of the vessel to the extent of the sum earned over and above the expenses and profits stipulated for, and that, to the extent of such sum, the owners had received so much payment on the price of the vessel, and that whether she was taken by the United States under the option given to purchase at any time, or perished by one of the perils against which the United States engaged to insure, this accruing clause was equally applicable. It was only the balance due on the price of the vessel which the original owner could claim, and not the amount of the valuation."

The claimants appealed.

Argument.

I.

It is submitted that the adjudication by the Third Auditor of the amount to be paid the appellants in this case, and the acceptance of the amount by them, must, under the recent decisions of this court, be considered a final settlement of their claim; and as they acquiesced for nearly two years before bringing suit in this payment, they would seem to have so considered it.

United States *vs.* Child, 12 Wallace, 232.

United States *vs.* Clyde, 13 Wallace.

II.

The construction put by the Court of Claims upon the two clauses in the charter-party, quoted above, was correct. By the first clause the vessel is valued at the sum of $40,000; and it is then provided that should she be retained so long in the service of the United States that the money paid and due on account of said charter (making certain deductions) shall be equal to said appraised value, then the vessel shall become the property of the United States.

This cannot be considered in any other light than as giving the United States an equitable interest in the vessel to the extent of the money actually paid and due for her services on account of the charter—an interest which, like a lien, would prevent any third party acquiring any property in the vessel, interfering with

the rights of the Government. Had the agreement been made with a private individual, it is clear that equity would interfere to protect this right, and to enjoin the owners of the vessel from selling it in derogation thereof. At any moment, too, under the second clause, by paying the amount still remaining due, the Government could become the actual and sole owner of the vessel. Such being the relations of the parties, how was this affected by the loss or destruction of the vessel? That destruction would undoubtedly have relieved the claimants from any obligation they incurred to sell, and deliver the vessel to the Government. But if the Government, notwithstanding this destruction, were willing still to elect to pay the amount which the parties had agreed should be considered as the value of the vessel, and to treat the vessel as still existing and in their possession, then the claimants could not refuse to accept it on the ground that the vessel was destroyed. They would be in nowise injured by the destruction of the vessel, and ought not to be permitted to set up the destruction of the vessel as against the claim of the Government to purchase, when the Government did not insist on the production of the vessel, and were willing to pay for it the same as if it were still in existence, and had been delivered over to them. Any other construction would defeat all equitable rights which the Government had acquired under the first clause quoted, and would have done so, if the owners had received the entire amount which would have transferred the property to the Gov-

ernment, less one or two hundred dollars. Such a construction is not to be given to the contract, if it can be avoided.

It may be contended that the Government would have lost their equitable rights in the vessel, if they had discharged it from the service before the owners had received the amount which is fixed upon as the purchase money. But the distinction between such a case and the present is, that there the Government would voluntarily have abandoned their rights, and the maxim, *Volenti non fit injuria*, would apply to the case.

C. H. HILL,
Assistant Attorney General

In the Supreme Court of the United States.

DECEMBER TERM, 1870.

No. ~~444~~. 228

NEW BEDFORD AND NEW YORK STEAM PROPELLER COMPANY, Appellants,
vs.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF COUNSEL OF APPELLANTS.

Abstract.

The appellants, an incorporated company under the laws of Massachusetts, owned the steamer called the Thorn; and the petition avers that on the 5th April, 1864, the boat entered into the service of the United States under a charter-party made by petitioners with the United States, through F. J. Crilly, Acting Quartermaster United States Army.

That the rate of compensation for the service of the boat fixed in the charter, was $150, which it is alleged was but a reasonable price; that the vessel remained in the service of the United States until the fourth day of March, 1865, when she was destroyed by the explosion of a rebel torpedo in the Cape Fear river, North Carolina, and became a total loss.

That by the terms of the charter-party the war risk was assumed by the United States, which covered such a loss.

That the actual and appraised value of the vessel at the time of loss was $40,000; that there has been received from the United States in consideration of said loss $28,602 36, and there is still due by the United States $11,397 64. Rec., p. 1.

The charter-party annexed to the petition is dated 5th of April, 1864, and grants, and to freight lets, to the United States, the steamboat Thorn. (See Rec., p. 2.) It provides, "the war risk to be borne by the United States; the marine risk by the owners." (See Rec., p. 2, foot, and p. 3, top.) The term of service was to be thirty days, and as much longer as her services might be required; and she was to be employed in such services as the United States might direct. See Rec., p. 3, top.

The pay agreed upon by the charter was $150 per day.

In the charter the vessel is valued and appraised at $40,000; and it was stipulated that should she be retained so long in the service of the United States that the money paid and due on account of said charter, deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of thirty-three per cent. per annum on said appraised value, shall be equal to said appraised value, then the said vessel shall become the property of the United States without further payment, except such as then may be due on the account of the services of the said vessel, rendered under the said vessel's charter.

The charter further provides, that "if at any time during the continuance of the charter the United States shall elect to purchase the said vessel, then they shall have the right to take her at the appraised value at the date of the charter, and all money then already paid and due on account of said charter, deducting therefrom the actual cost of running and keeping in repair the vessel

during the time, together with a net profit of thirty-three per cent. per annum on the original appraised value, shall apply on account of the purchase." See Rec., p. 3.

The answer of the United States denied generally all the allegations of the petition; specially that the amount claimed was due, and that petitioners were loyal. See Rec., p. 4, top.

Subsequently the assistant attorney general put in further objections to the petition—

1st. Because the decision of the department on the claim was not set forth.

2d. That the petition does not set forth a full statement of the action as required by section 1st of act of February 4, 1855.

3d. That the *evidence* in the case does not show that any application has ever been made to any department of the Government, &c. See Rec., p. 4, foot.

The Court of Claims gave judgment in favor of defendants. Rec., p. 5, top.

The claimants have appealed.

The Court of Claims found the facts of the contract of charter as described in the petition, as well as the destruction of the boat by the public enemy while she was in service of the United States under the charter. See Rec., p. 5, foot, and 6, top.

That the claimant presented to the Government a claim for the appraised value of the boat, $40,000.

That the claim was transmitted by the Quartermaster General to the Third Auditor, in an account made out by the former and fully set out in the findings. See Rec., p. 6.

That account purports to be a purchase of the Thorn by the United States at the price of $40,000, and by adding thereto thirty-three per cent. per annum profit and running expenses, find the United States indebted to the claimant in the sum of $75,096 11, from which the Quar-

termaster General deducts the amounts previously paid claimants for services of boat, and also a sum for alleged loss of time, and strikes a balance in favor of claimant of $26,602 36. Rec., p. 6.

The court further finds that on this reference the Third Auditor made an adjudication, stating that there was due by the United States to claimant $28,602 36. Rec., p. 6, foot, and 7, top.

That this amount was paid to claimant, and no more.

That the steamer at the time of her loss was worth $40,000.

That the United States never at any time notified claimant of an election to purchase the vessel, or to take her under the accruing or purchase clauses of the charter.

That the claimants were loyal and never aided the rebellion. Rec. p. 7.

The court below considered that the United States, on every payment to claimants for service, became owners *portanto*, and as insurers only owed the remainder of the price.

Points.

First. In this case there was an amount found to be due according to the statement of an accounting officer of the United States Treasury Department, of a certain sum of money, $28,602 36, in favor of the petitioners, (Rec., p. 7,) which sum was paid to and received by petitioners. See sixth finding, record, p. 7.

Was the receipt of this amount by the petitioners such an act as precludes them from recovering the remainder of $11,397 64, which added to the amount paid, would make the value of their boat $40,000?

In the case of United States *vs.* Adams, (7 Wallace, p. 463,) where an extraordinary board of commissioners had been organized by the Secretary of War, for the examination of a certain class of claims, when a claimant volun-

tarily submitted his claim to the board, which heard and finally decided thereon, and when the claimant recived a voucher stating the amount due him by the board, and when the claimant accepted payment of that amount under an act of Congress providing therefor, (See 7th Wallace, 479, foot,) it was held by this court that so receiving the amount awarded by the board, being less than what he had claimed before it, the claimant was precluded from having an action against the United States for the remainder. The board had exacted from the claimant "a receipt in full of all demands," but this court expressly aid that circumstance did not enter into the considerations which led to the court's conclusions. See 7 Wallace, p. 479.

The principle of the decision is, that when a claimant is a party to proceedings before an exceptional tribunal, constituted for the purpose of examining and deciding a class of claims disputed by the United States, of which his was one, and he takes the benefit of the adjustment of his accounts by them, though less than his claim, he is precluded from further demand. See United States *vs.* Adams, 9 Wallace, p. 560.

In the case of the United States *vs.* Alonzo Child and others, No. 153, December term, 1870, the principle laid down in the Adams case was reiterated and affirmed, the court saying, "here was a claim, the justice of which had been denied, and the amount that was due on it had been in dispute for nearly two years. The Government finally says to the claimant, we will pay you a certain sum on this disputed claim, provided you will take it in full satisfaction of the whole, when without intimidation, without fraud or concealment on the part of the Goverment, without protest or objection on their part, claimants accept the money offered. and sign a receipt acknowledging it to be in full of the whole claim. Is not this a legal and binding compromise of the disputed demand? Is it not a vol-

untary adjustment of the matter in dispute between the parties ?"

The sum of these decisions is, that where an unliquidated demand is disputed by the debtor, and a compromise on a smaller sum is arrived at, the receipt of such sum by the creditor is a waiver of all right to claim the remainder.

The limit of this principle is understood to be strictly observed by this court in the case of United States *vs.* Thomas Clyde, No. 43, December term, 1871. Clyde having chartered his steamboat to the United States, acting through a subordinate officer of the Quartermasters Department, at a certain rate, was notified, after his vessel had been some time in service, by the Quartermaster General, of a reduction of the rate, which made the rate a matter of dispute between the United States and Clyde, and "under these circumstances the final determination of the latter to take the balance of the account as made out on the basis contended for by the Government, and his giving a receipt in full, is clear evidence that he agreed to take that balance in satisfaction of the claim ; and this fact under the circumstances of the case precludes him from making any further demand. The receipt Clyde gave was "in full of the above account," which was stated by the Quartermasters Department. See opinion.

The case now before the court, does not come within the scope of the principles of cases quoted. Here there was no receipt given of any kind, and no compromise of a disputed claim, but simply a partial payment on a liquidated demand about which there could be legally no dispute whatever.

Second. The contract of charty-party between the petitioner and the Government, (see record, p. 3, at top), made the United States an insurer against the risk by which the vessel perished ; she was worth $40,000 at the time she entered the service, (see seventh finding, record, p. 7),

and at that sum she was valued in the charter-party. See record, p. 3, middle.

Whether this was an open or a valued policy, the Government was an underwriter, then, for forty thousand dollars. It was a liquidated claim. The claimant presented it to the Quartermaster General at $40,000; the Quartermaster General admitted it at that amount. (See record, p. 6.) There was no dispute about value, either when the claimant made his demand for a total loss, or at any other time.

Third. The vessel having perished on 4th of March, 1865, by the peril insured against, the petitioner made his claim for the insurance, the relation in which he stood to the United States by his contract, and by his claim under it, was that of an assured party towards his underwriter. That attitude, so far as petitioner was concerned, was never changed.

Nearly a year after the loss, on the 14th February, 1866, the Quartermaster General writes to the Third Auditor of the Treasury transmitting for his information and official action, the final account for purchase of steamer Thorn, (see record, p. 6.,) which was the first intimation ever made by the United States of a design to purchase.

In this, the Quartermaster General supposed himself to be acting under a clause in the charter-party, which reads as follows:

"And further, if at any time during the continuance of the charter the United States shall elect to purchase the said vessel, then they shall have the right to take her at the appraised value at the date of charter, and all money then already paid and due on account of said charter, deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of thirty-three per cent. per annum on the

original appraised value, shall apply on account of the said purchase."

The Quartermaster General has by law the power, when authorized by the Secretary of War, to procure and provide means of transport for the army, its stores, artillery and camp equipage.

See Sec. 2, Act of March 28, 1812; 2d Stat. at Large, p. 696.

But he cannot purchase any steam or sailing vessel until the same shall be first inspected by one or more competent naval officers detailed, &c., &c.

See Sec. 9, Act of July 4, 1864; 13 Stat. at Large, p. 397.

With such purchases made by the Quartermaster General, the Third Auditor of the Treasury has no legal connection whatever; he can only adjust claims for property lost or destroyed in the military service.

See Act of March 3, 1849; Ninth Stat. at Large, pp. 414–15.

Sec. 5, Act of March, 1863, 12th Stat. at Large, p. 743.

Sec. 8, Act of 28th July, 1866; 14th Stat. at Large, p. 327.

The purchase and the reference to the Third Auditor are simply a misapprehension of the law.

Third. The right of the United States to purchase did not exist at the time the Quartermaster General attempted to exercise it. They could purchase only during the continuance of the charter, which came to an end with the destruction of the vessel, eleven months before the action of the Quartemaster General.

"The extinction of the thing due extinguishes the debt, twhen the thing is wholly destroyed."

See Evans' Translation of Pother on Obligations, Phil., 1849, p. 338, (624.)

"If the performance of a contract becomes impossible by the act of God, that is, by a cause which could no possibly be attributed to the promissor," &c., &c. t

See Parsons on Contracts, Boston, 1866, 2d vol., p. 672.

Performance in this case became impossible by the destruction of the vessel by a risk which the defendants had taken upon themselves; of course, then, the contract was at an end; after that event the charty-party had, legally speaking, no continuance.

Any event that renders the execution of the contract impossible, without the fault of the obligor, puts an end to the charter-party.

See Abbott on Shipping, Boston, 1846, p. 703.(†595.)

In a case where, by the terms of the charter-party, the freighter was bound to pay an allowance for extra men, and part payment having been made, the remainder was not to be paid, *till the ship's discharge or return from her voyage*, and she was destroyed at sea, it was held that such loss was a discharge of her from the freighter's employment, as if by the act of the freighter, and that, thereupon, the extra allowance became payable. Such was the ruling of Lord Ellenborough in the case of Havelock *vs.* Geddes and others; see the close of his opinion in the case, on p. 514, of vol. 5, edition Phil., 1845, of East's reports.

Fourth. A thing which is destroyed, *i. e.*, does not exist, cannot be the subject of the contract of sale. After the vessel was destroyed it was impossible for the United States to buy it, and for the petitioner to sell it.

"Three particulars are included in a valid sale, namely, a thing which is the subject of it, a price, and a consent of parties. If the subject of the intended sale have no existence actually or potentially, there can be no valid sale."

See Long on sales of personal property, Boston, 1839, page 3.

2d Kent Com., 4th edition, p. *468.

Story on Sales, Boston, 1847, p. 148, §184.

At the time of the alleged purchase, the steamer did not exist; the circumstance of a sale could not be predicated of it; it had ceased to be the subject of such a contract; the owner then had no property to transfer. In such a case, had the owner sold to a private person and received a price, it could be recovered back from him in an action for money had and received.

This point is too plain for further argument. When the Quartermaster General Meigs made a paper purporting to be evidence of a sale and purchase, he committed an act which was a mere nullity, and an attempt to perform what is absolutely impossible in law and fact.

Fifth. The Court of Claims, avoiding the error of the Quartermaster General, has fallen into one of a similar kind, in endeavoring to bring the case under another clause of the contract, which reads as follows:

"The said vessel is valued and appraised at the sum of forty thousand dollars, and should she be retained so long in the service of the United States that the money paid and due on account of said charter, (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of thirty-three per cent. per annum on said appraised value,) shall be equal to said appraised value, then the said vessel shall become the property of the United States without further payment, except such sum as may then be due on account of the service of said vessel, rendered under the said vessel charter."

The court below held that, under such a charter-party the United States became the equitable owner of the vessel to the extent of the sum earned, over and above the expenses and profits stipulated for, and that to the extent of such sum the owners had received so much payment on the price of the vessel. See finding, ninth record, p. 7, and reasoning of the court in this case, 5th Court of Claims

Reports, p. 274, and in Spear and Lang's case, same volume, p. 169, *et seq.*

According to this reasoning the United States, the defendants, became joint owners day by day, and while the petitioner would be paying the defendants' (if owner) portion of the expenses of crew and provisions, and of ordinary repairs, defendants (if owner) would be paying petitioner hire for their own (in part) steamer—this is utterly inconsistent with the terms of the contract and the meaning of the parties, and the premises which give rise to such conclusions must necessarily be false.

The clause of the contract in question gives the right of purchase to the United States on the happening of a future and uncertain event; they are not bound to purchase; they might decline to do so; but the petitioner on the happening of the event could not compel the United States to take the vessel.

The obligation was in its nature indivisible, and could not be executed in part; the happening of the event of the net earnings, being equal to $40,000, was an entirety; and the clause makes no mention of fractions, so that the obligation is indivisible by the contract and by its nature.

"En bref, l'obligation indivisible, *natura et contractu*, est l'obligation d'une chose qui par elle même, par sa nature, et sous quelque espèce qu'on la considère, n'est pas susceptible de parties; l'obligation indivisible *obligatione*, est l'obligation d'une chose qui, considerée sous le rapport sous lequel elle fait l'objet de l'obligation, n'est pas susceptible de parties.

"Il est évident que ces obligations qui sont indivisibles soit *contractu*, soit *obligatione*, le sont aussi *solutione;* car on ne peut payer par parties ce qui n'est pas susceptible de parties." Traité des obligations. Pothier. Tome premier, art. 944.

"When parties enter into a contract by which the amount to be performed by the one and the consideration to be paid by the other, are made certain and fixed, such a contract cannot be apportioned." Parsons on Contracts, vol. 2, p. 520, edition 1866.

The contract made by the parties, the petitioner, and the United States is not to be changed under notions of equity; such a contract as the court below made for them might have been a better one, perhaps, than the one they made, but it is the province of courts to enforce such contracts as are presented, and not to make new ones for the parties.

Respectfully submitted.

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